# Gang Deterrence: A Legal Analysis of H.R. 1279 With References to S. 155

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SUMMARY

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The Gang Deterrence and Community Protection Act of 2005, H.R. 1279 as passed by the House, among other things, would dramatically increase the criminal penalties that follow as a consequence of a conviction for violent crimes, including gang offenses. It would expand the instances where juveniles charged with federal crimes of violence can be tried as adults and would authorize the establishment of criminal street gang enforcement teams.

More precisely, it would establish either longer maximum prison terms or mandatory minimum terms (or both) for federal street gang offenses, Travel Act violations, carjacking, use of a firearm during and in relation to a crime of violence or of drug trafficking, conspiracy, murder and other crimes of violence for hire or in aid of racketeering, multiple interstate murders, use of weapons to commit a crime of violence, and the commission of crimes of violence by illegal aliens.

It also contains a number of procedural amendments which would expand inmate isolation orders; would tighten preventive detention procedures in firearms cases; would ease venue requirements in cases of violence in aid of racketeering, of crimes of violence during and in relation to drug trafficking, and in capital cases; would lengthen the statute of limitations for federal crimes of violence; would expand the "wrongdoer" hearsay exception (in civil and criminal cases) to reach those who could foresee the wrongdoing; and would permit the prosecution as adults of 16- and 17-year-olds charged with certain violent crimes without a prior transfer hearing.

In addition, it would enlarge the list of racketeering predicates to include misconduct that would have constituted a state crime racketeering predicate had it not been committed within a federal enclave; would add drug trafficking crimes to the general definition of crimes of violence; would authorize a publicity campaign to herald the act's penalty enhancements; would call for information relating to illegal aliens to be added to FBI's databases; would direct that a study be conducted of the connection between illegal aliens and criminal gangs; and would authorize increased law enforcement assistance for areas of high intensity criminal gang activity.

The Gang Prevention and Effective Deterrence Act of 2005, S. 155, has similar provisions in many instances.

This report appears in abridged form, without footnotes, citations or quotation marks, as CRS Report RS22165, An Abridged View of the Gang Deterrence and Community Protection Act (H.R. 1279). Related reports include CRS Report RL32943, Gang Prevention and Suppression Legislation in the 109th Congress: Side-By-Side Comparison of S. 155, H.R. 970, and H.R. 1279.

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# Gang Deterrence: A Legal Analysis of H.R. 1279 With References to S. 155

## Introduction

The House passed H.R. 1279, the Gang Deterrence and Community Protection Act of 2005, on May 11, 2005, 151 *Cong. Rec.* H3161 (daily ed. May 11, 2005).[1] S. 155, the Gang Prevention and Effective Deterrence Act of 2005, addresses many of the same issues often to similar effect and occasionally in the same language as H.R. 1279 and as in S. 1735 (108th Congress)(which the Senate Judiciary Committee sent to the floor without written report, 150 *Cong. Rec.* S. 7580 (July 6, 2004)).

## Section 101. Criminal Street Gangs

Section 101 of H.R. 1279 as passed by the House would amend 18 U.S.C. 521. In its present form section 521 calls for a sentencing enhancement of not more than 10 years for anyone who is:

I. convicted of committing or conspiring to commit
  A. a federal controlled substance offense whose maximum penalty is not less than five years, or
  B. a federal crime of violence that has an element the use or attempted of force against another; and
II. who
  A. participates in a criminal street gang, i.e.,
    1. an ongoing group, club, organization, or association of 5 or more persons that
    2. one of whose purposes is the commission of
      a. a federal controlled substance crime whose maximum penalty is not less than five years, or
      b. a federal crime of violence that has an element the use or attempted of force against another;
    3. whose members have engaged within the last five years in a continuing series of such crimes; and
    4. whose activities affect interstate or foreign commerce
  B. with the knowledge that its members have engaged such a continuing series of crimes
  C. intents
    1. to promote or further the felonious activities of the gang, or
    2. to maintain or increase his or her position in the gang, and
  D. has a prior conviction or determination of delinquency (within the last five years) for committing or conspiring to commit

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[1] H.Rep.No. 109-74 (2005) contains the Judiciary Committee report and markup transcript on H.R. 1279.

1. a federal or state controlled substance crime whose maximum penalty is not less than five years,
2. a federal or state crime of violence that has an element the use or attempted of force against another; or
3. a federal or state crime that by its nature involves a substantial risk of force will be used against another.

The bill would replace section 521 with a new, separate crime.[2] It would establish increased maximum and mandatory minimum penalties for the misconduct it proscribes. It would reduce from 5 to 3 the number of gang members required for coverage under the section. It would outlaw attempts and threats to commit a street gang offense and would raise the penalty for conspiracy to commit such an offense. It would enlarge the section's predicate offense inventory, that is the crimes that qualify as street gang crimes. It would add the section to the list of money laundering predicates. And it would require criminal forfeiture of property derived from or used to facilitate the commission of a violation of the act. More precisely it would punish anyone who:

I.A. commits,
B. conspires to commit,
C. attempts to commit, or
D. threatens to commit
II. a gang crime, i.e., state or federal felony that constitutes
A. a crime of violence (other than a crime of violence against the property of another),
B. burglary,
C. obstruction of justice,
D. drug trafficking,
E. conduct punishable under
1. 18 U.S.C. 844(explosives offenses)
2. 18 U.S.C. 922(a)(1)(unlawful interstate or foreign transportation of a firearm or ammunition)
3. 18 U.S.C. 922(d)(firearm sale or disposal to a member of disqualified class)
4. 18 U.S.C. 922(g)(1)(firearm possession by a felon convicted a crime of violence or drug trafficking)
5. 18 U.S.C. 922(g)(2)(firearm possession by a fugitive)
6. 18 U.S.C. 922(g)(3)(firearm possession by an addict)
7. 18 U.S.C. 922(g)(4)(firearm possession by a mental defective)
8. 18 U.S.C. 922(g)(5)(firearm possession by an illegal alien)
9. 18 U.S.C. 922(g)(8)(firearm possession by an individual under a domestic violence restraining order)
U.S. citizenship)
10. 18 U.S.C. 922(g)(9)(firearm possession following a misdemeanor conviction for domestic violence)
11. 18 U.S.C. 922(i)(interstate or foreign transportation of a stolen firearm or ammunition)
12. 18 U.S.C. 922(j)(receipt of a stolen firearm or ammunition transported in interstate or foreign commerce)
13. 18 U.S.C. 922(k)(interstate or foreign transport of a firearm with an altered

[2] Section 102 of S. 155 has comparable provisions.

serial number)*[3]
14. 18 U.S.C. 922(n)(interstate or foreign transport of a firearm by an individual under felony indictment)*
15. 18 U.S.C. 922(o)(unlawful possession of a machine gun)
16. 18 U.S.C. 922(p)(unlawful possession of undetectable firearms)*
17. 18 U.S.C. 922(q)(unlawful possession of a firearm in a school zone)*
18. 18 U.S.C. 922(u)(theft of a firearm from a licensed dealer)*
19. 18 U.S.C. 922(x)(unlawful transfer of a handgun or handgun ammunition to a juvenile)*
20. 18 U.S.C. 924(b)(interstate or foreign transportation of a firearm with the knowledge it will be used to commit a felony)
21. 18 U.S.C. 924(c)(firearm possession during and in relation to a crime of violence or drug trafficking offense)
22. 18 U.S.C. 924(g)(interstate travel to acquire a firearm for use in a crime of violence, a RICO predicate offense, or federal or state drug offenses)
23. 18 U.S.C. 924(h)(transfer of a firearm with the knowledge it will be used to commit a crime of violence or drug trafficking offense)
24. 18 U.S.C. 924(k)(smuggling a firearm into the U.S. with the intent to promote a crime of violence or federal or state drug offense)*
25. 18 U.S.C. 924(l)(theft of a firearm moving or that has moved interstate or foreign commerce)*
26. 18 U.S.C. 924(m)(theft of a firearm from a licensed dealer)*
27. 18 U.S.C. 924(n)(interstate or foreign travel with the intent to engage in unlawful firearms transactions)*
28. 18 U.S.C. 930(possession of firearms or dangerous weapons in federal facilities)*
29. 18 U.S.C. 931(possession of body armor by violent felons)*
30. 18 U.S.C. 1028 (identification fraud)
31. 18 U.S.C. 1028A(aggravated identity fraud)
32. 18 U.S.C. 1029(access device fraud)
33. 18 U.S.C. 1952 (travel act)
34. 18 U.S.C. 1956 (money laundering)
35. 18 U.S.C. 1957 (unlawful financial transactions)
36. 18 U.S.C. 2312 (interstate transportation of stolen vehicles)
37. 18 U.S.C. 2313 (receipt of stolen vehicles transported in interstate or foreign commerce)
38. 18 U.S.C. 2314 (interstate transportation of stolen goods)
37. 18 U.S.C. 2315 (receipt of stolen goods transported in interstate or foreign commerce)
39. 8 U.S.C. 1322 (bringing in or harboring aliens)
40. 8 U.S.C. 1327 (unlawfully aiding alien entry into the U.S., or
41. 8 U.S.C. 1328 (importation of an alien for immoral purposes)

III. A. to further the activities of,
B. gain entrance to, or
C. maintain or increase the offender's position in

IV. a criminal street gang, i.e.
A. a group of 3 or more individuals who commit
B. 2 or more gang crimes (one of which is a crime of violence other than a drug trafficking offense)

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[3] S. 155 also amends 18 U.S.C. 521. Offenses designated with an * are on H.R. 1279's predicate offense list but not upon S. 155's. S. 155, on the other hand, lists at least two predicates not included in H.R. 1279's list – federal or state arson offenses and violations of 18 U.S.C. 1708 (theft of mail).

C. in 2 or more separate criminal episodes in relation to the gang, and
D. the gang's activities affect interest or foreign commerce.

Where section 521 in its present form makes criminal street gang offenses punishable by imprisonment for not *more* than 10 years, H.R. 1279 would make them punishable by imprisonment for life or any term years not *less* than 10 years (by not less than 20 years if the offense results in serious bodily injury; by not less than 30 years if the predicate offense is kidnaping, aggravated sexual assault, or maiming; and by death or imprisonment for life if death results). S. 155, in contrast, would make any violation of its version of 18 U.S.C. 521 punishable by imprisonment for not more than 30 years (by imprisonment for any term of years or for life, if the predicate offense carries a life sentence).[4] S. 155 would call for neither mandatory minimums nor the death penalty.

Upon conviction, H.R. 1279 would require confiscation of any property derived from or used to facilitate a criminal street gang offense, proposed 18 U.S.C. 521(b). S. 155 would permit confiscation under similar criminal forfeiture procedures or under civil procedures which can be used without requiring a criminal prosecution, proposed 18 U.S.C. 521(d).

Finally, section 101 of H.R. 1279 would amend the principal federal money laundering statute, 18 U.S.C. 1956, to make it a crime to launder criminal street gang proceeds, proposed 18 U.S.C. 1956(c)(7)(D). S. 155 would not, but unlike H.R. 1279, in section 205 it would authorize the use of wiretapping and other forms of electronic surveillance in criminal street gang cases, proposed 18 U.S.C. 2516(1)(t). The consequences of the forfeiture, money laundering and wiretapping amendments are less sweeping than they might initially appear since many of the criminal street gang predicates are already predicate offenses for forfeiture, money laundering and/or wiretapping purposes, 18 U.S.C. 981, 982, 1956(c), 2516(1).

## Section 102. Increased Travel Act Penalties

The Travel Act, 18 U.S.C. 1952, outlaws interstate travel or the use of the mail or facilities of interstate or foreign commerce in order to distribute crime-generated proceeds, or to commit a crime of violence or otherwise operate in furtherance of illegal gambling, drug trafficking, or various other racketeering offenses. H.R. 1279 would increase Travel Act penalties so that a violation involving the distribution of racketeering proceeds or to promote racketeering activities would be punishable by imprisonment for not less than 5 nor more than 20 years (up from not more than five years); a violation involving a crime of violence is punishable by imprisonment for not less than 10 nor more than 30 years (up from not more than 20 years) or, if death results by death or imprisonment for any term of years or for life (up from imprisonment for any term years or for life). It would establish the same penalties

[4] S. 155 would also outlaw criminal street gang recruitment and violent crimes in furtherance of criminal street gangs, proposed 18 U.S.C. 522, 523, respectively.

for conspiracy to violate any of these provisions (conspiracy is now punishable by imprisonment for not more than five years[5]).

S. 155 would increase the Travel Act's promotion and proceeds penalties to not more than 10 years and would authorize use of the death penalty where a violation results in death, proposed 18 U.S.C. 1952(a). It would also amend the Travel Act to prohibit interstate or foreign travel, or use of the mails or a facility of interstate or foreign commerce, for the purpose of obstructing justice; misconduct which it would make punishable by imprisonment for any term of years and, if death results, by death or imprisonment for any term of years or for life, proposed 18 U.S.C. 1952(b).

## Section 103. Violent Crime Amendments

### Carjacking.

Federal law outlaws carjacking if the crime is committed with intent to cause death or serious bodily harm. Subsection 103(a) would make the offense punishable regardless of whether it is committed with such an intent. It would also increase the penalties for violations so that an offense under 18 U.S.C. 2119 would be generally punishable by imprisonment for more than 20 years (up from not more than 15 years); if the offense results in serious bodily injury, it would be punishable by imprisonment for not less than 10 nor more than 30 years (up from not more than 25 years); and it would make conspiracies subject to the same punishment as the underlying offense (up from not more than five years[6]). The parallel provision in S. 155 (subsection 105(e)) would merely eliminate the specific intent requirement and would leave the sentencing structure unchanged.

### Firearms Used in Crimes of Violence.

As for subsection 103(b), 18 U.S.C. 924(h) now reads:

> Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

There is some question whether the necessary "crime of violence" may be either a state or federal crime of violence. Subsection 924(c)(2) cited for the definition of a qualifying "drug trafficking crime" refers to three specific federal statutes; subsection 924(c)(3) cited for the definition of "crime of violence" refers to no specific federal law but instead speaks to the nature of the crimes which should be

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[5] Subsection 103(d) of H.R. 1279, however, would increase the penalty under the general conspiracy statute, 18 U.S.C. 371, from imprisonment for not more than five years to imprisonment for not more than 20 years.

[6] Subsection 103(d) of H.R. 1279, however, increases the penalty under the general conspiracy statute, 18 U.S.C. 371, from imprisonment for not more than five years to imprisonment for not more than 20 years.

considered crimes of violence without indicating whether they need be federal crimes or may be state crimes as well.[7]

The few lower courts to consider the question have suggested that as a matter lenity and perhaps constitutional necessity, the "crimes of violence" mentioned in subsection 924(h) can only be federal crimes of violence, *United States v. McLemore*, 28 F.3d 1160, 1162-165 (11th Cir. 1994); *United States v. Acosta*, 124 F.Supp.2d 631, 633-38 (E.D.Wis. 2000).[8]

The subsection as written provides that upon a conviction an offender might be sentenced to either a fine or a term of imprisonment or both. Until recently, the operation of the United States Sentencing Guidelines made it unlikely that a defendant, even a first time offender, would be sentenced simply to a fine, see U.S.S.G. §2K2.1. This result is less certain now that it has become clear that the Guidelines are simply advisory, *United States v. Booker*, 125 S.Ct. 738, 756-57 (2005).

As amended by H.R. 1279, subsection 924(h) would read:

> Whoever *in or affecting interstate or foreign commerce,* knowingly transfers a firearm, knowing *or intending* that *the* firearm will be used to commit*, or possessed in furtherance of,* a crime of violence or drug trafficking crime (as defined in subsection (c)(2)) shall be *fined under this title and* imprisoned not *less than five years nor* more than *20* years (changes made by H.R. 1279 noted in italics).

Thus, H.R. 1279 would amend 18 U.S.C. 924(h) to make it clear that those convicted of violating its provisions might be sentenced to a term of imprisonment *and* a fine. In fact, it would establish a five year mandatory minimum term of imprisonment and would increase the maximum to imprisonment for not more than 20 years (up from not more than 10 years). As to the question of whether state as well as federal crimes may be considered crimes of violence for purposes of subsection 924(h), it would suggest that they might by supplying a jurisdictional element that the jurisdictional foundation for a predicate federal crime might otherwise have to provide.[9] Moreover, it would remove the cross reference to the definition of crime of violence found in 18 U.S.C. 924(c)(3). By doing so, the default definition of "crime of violence," in

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[7] "(2) For purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

"(3) For purposes of this subsection the term 'crime of violence' means an offense that is a felony and – (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(2),(3).

[8] The Supreme Court has concluded that neither guns nor violence alone are sufficient to awaken Congress' legislative powers under the commerce clause, *United States v. Lopez*, 514 U.S. 549, 567 (1995); *United States v. Morrison*, 529 U.S. 598, 617 (2000).

[9] I.e., the offense is prosecutable only when committed "in or affecting interstate or foreign commerce."

18 U.S.C. 16, would become operable. In a subsequent section, H.R. 1279 would amend 18 U.S.C. 16 to make it accommodating for use when both state and federal crimes of violence are contemplated in the substantive provision. Only time couldl tell whether these amendments would be found sufficient to overcome contrary implications of *McLemore* and *Acosta*.

The amendments to 18 U.S.C. 924(h) in S. 155 are more modest. In subsection 105(f), the Senate bill would simply add the "possessed in furtherance of" language, so that as in the case of the H.R. 1279 amendments, the prosecution would have no need to show that the firearm was affirmative used. It would add no jurisdictional element, it would establish no mandatory minimum, and it would allow the 10 year maximum term of imprison to stand as a sentencing alternative or supplement to a fine under title 18, *i.e*, a fine of not more than $250,000 for individuals and not more than $500,000 for organizations, 18 U.S.C. 3571.

### Prisoner No Contact Sentences.

Subsection 103(c) of H.R. 1279 would amend 18 U.S.C. 3582(d) to permit federal sentencing courts to restrict those with whom defendants convicted of racketeering, drug, or criminal street gang offenses may associate or communicate – including their attorneys – upon a showing of probable cause that the association or communication is for the purpose of directing or participating in a criminal enterprise. As subsection 3582(d) now stands it exempts attorneys from the order's reach and does not include street gang offenses.[10] Whether because it has been little used or because prison officials enjoy comparable regulatory authority,[11] there are few cases construing the authority granted in subsection 3582(d). One of the few cases to address the subsection concluded that it authorized an order forbidding an inmate from communication with everyone but close family members, *United States v. Felipe*, 148 F.3d 101, 110 (2d Cir. 1998).[12]

The comparable provision in S. 155, subsection 105(g) would permit the authority of subsection 3582(d) to be used for defendants convicted of criminal street

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[10] "The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise," 18 U.S.C. 3582(d).

[11] 28 C.F.R. §501.3 (prevention of acts of violence and terrorism) authorizes federal prison authorities to implement the use of "special administrative measures" which in some forms could be thought to intrude upon constitutional rights to the assistance of counsel, access to the courts, or due process, *cf., United States v. Reid*, 214 F.Supp.2d 84, 92-6 (D.Mass. 2002).

[12] Felipe apparently was allowed to communicate only with prison employees, his attorney and five approved family members, but was not allowed visits from either his attorney or family, *see, United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir. 2000)

gang violations, but would leave in place the attorney exception to the association and communications bar.

### Conspiracy as a 20 Year Felony.

Subsection 103(d) of the H.R. 1279 would increase the penalty under 18 U.S.C. 371 for conspiracies to violate the laws of the United States or to defraud the United States from imprisonment for not more than five years to imprisonment for not more than 20 years.

Under existing law conspirators are liable both for conspiracy and for the underlying crime that is the object of the conspiracy;[13] in fact they are each liable for any foreseeable crime committed by any of the conspirators in furtherance of the scheme.[14] In recent years, Congress has made conspiracy to violate many of the more seriously punished federal crimes subject to the same penalties as the underlying offense thereby providing an alternative to the five year maximum found in general conspiracy provision of 18 U.S.C. 371.[15]

There are scores and perhaps hundreds of federal felonies, the majority of which carry a maximum term of imprisonment of less than 20 years. For these crimes, subsection 103(d) would mean that planning to commit them would be punished more severely than committing them. There is no comparable provision in S. 155.

## Section 104. Murder and Other Violence for Hire: Increased Penalties for Use of Interstate Commerce

Federal law now condemns interstate travel or the use of the mails or any facility in interstate or foreign commerce in furtherance of the commission of a murder for hire, 18 U.S.C. 1958. Section 104 of H.R. 1279 would amend section 1958 to include crimes of violence other than murder within the proscription and would increase the sanctions for those violations that are not capital:

> Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder *or other crime of violence, punishable by imprisonment for more than one year* be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, *shall, in addition to being subject to a fine under this title –*
>
> *(1) if the crime of violence or conspiracy results in the death of any person, be sentenced to death or life in imprison;*

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[13] *Iannelli v. United States,* 420 U.S. 770, 777-78 (1975).

[14] *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946).

[15] For instance, section 810 of the USA PATRIOT Act, 115 Stat. 380 (2001), did this for various federal crimes of terrorism, and H.R. 1279 does it for federal carjacking and criminal street gang offenses, proposed 18 U.S.C. 2119, proposed 18 U.S.C. 521(a).

*(2) if the crime of violence is kidnaping, aggravated sexual abuse (as defined in section 521), or maiming, or a conspiracy to commit such a crime of violence, be imprisoned for life or any term of years not less than 30;*

*(3) if the crime of violence is an assault, or a conspiracy to assault, that results in serious bodily injury (as defined in section 1365), be imprisoned for life or any term of years not less than 20; and*

*(4) in any other case, be imprisoned for life or for any term of years not less than 10.*

The sentencing clause of section 1958 in its present form reads, "shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both. The obvious difference is the introduction of life imprisonment as the uniform maximum term of imprisonment and of mandatory minimum terms of imprisonment at or above what were the previous maximums.

The comparable provision in S. 155, section 106, would simply adjust the general maximum term of imprisonment from not more than 10 years to not more than 20 years; the maximum in cases where bodily injury results from not more 20 years to not more than 30 years; and the maximum in cases where death results from death or life imprisonment to death, or imprisonment for life or any term of years.

## Section 105. Violence in Aid of Racketeering: Penalty Increases

Federal law prohibits murder and other forms of violence committed on behalf of a racketeering enterprise, either for hire or when motivated by reasons of membership in the enterprise. One of the principal differences between 18 U.S.C. 1958 (murder for hire) and 18 U.S.C. 1959 (violence in aid of racketeering) is jurisdictional; section 1958 requires interstate or foreign travel or use of the facilities of interstate or foreign commerce; section 1959 requires a nexus with an enterprise engaged in or whose activities affect interstate or foreign commerce in whose aid the violence is committed. Given the similarities, it is perhaps not surprising that the sentencing increases in section 105(a) for violence in aid of racketeering mirror those in section 104 for murder or violence for hire – imprisonment for life as a standard maximum sanction with escalating mandatory minimums often set at what had been the previous maximum sanction:

[REPEALED: Whoever . . . shall be punished –]
*Whoever . . . shall . . . in addition to being subject to a fine under this title –*

[REPEALED: (1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnaping, by imprisonment for any term of years or for life, or a fine under this title, or both;

[REPEALED: (2) for maiming, by imprisonment for not more than thirty years or a fine under this title, or both;]

*(1) if the crime of violence results in the death of any person, be sentenced to death or life imprisonment;*

*(2) if the crime of violence is kidnaping, aggravated sexual assault (as defined in section 521), or maiming, be imprisoned for life or any term of years not less than 30;*

[REPEALED: (3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both;]

*(3) if the crime of violence is assault resulting in serious bodily injury (as defined in section 1365), be imprisoned for life or for any term of years not less an 20; and*

*(4) in any other case, be imprisoned for life or any term of years not less than 10.*

[REPEALED: (4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine under this title, or both;

[REPEALED: (5) for attempting or conspiring to commit murder or kidnaping, by imprisonment for not more than ten years or a fine under this title, or both; and

[REPEALED: (6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine under this title, or both.]

S. 155's treatment of sentencing under 18 U.S.C. 1959 is likewise comparable to its treatment of sentencing under 18 U.S.C. 1958. It would establish no mandatory minimums, but would impose an escalating series of increased sanctions.[16]

Section 105 of H.R. 1279 would insist that its penalties be in addition to and served consecutive to penalties imposed for other racketeering offenses, would use the generic term "crime of violence" as a trigger rather than use of murder, kidnaping and the other specifically identified violent crimes now used in 18 U.S.C. 1959(a), and would add commission in furtherance of racketeering as an alternative

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[16] "Whoever . . . shall be punished – (1) for murder, by death or *imprisonment for any term years or for* life, a fine under this title, or both;

"(2) for kidnaping, *or sexual assault*, by imprisonment for any term of years or for life, a fine under this title, or both;

"(3) for maiming, by imprisonment for *any term of years or for life* [up from not more than 30 years], a fine under this title, or both;

"(4) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than *30 years* [up from not more than 20 years], a fine under this title, or both;

"(5) for threatening to commit a crime of violence, by imprisonment for not more than *10 years* [up from not more than five years], a fine under this title, or both;

"(6) for attempting or conspiring to commit murder, kidnaping, *maiming, or sexual assault* by imprisonment for not more than *30 years* [up from not more than 10 years in the case of murder or kidnaping attempts or conspiracies; not more than three years in the case of maiming or sexual assault attempts or conspiracies], a fine under this title, or both; and

"(7) for attempting or conspiring to commit assault *with a dangerous weapon or assault which* results in serious bodily injury, by imprisonment for not more than *20 years* [up from not more than three years], a fine under this title, or both," proposed 18 U.S.C. 1959(a).

motivational element,[17] proposed 18 U.S.C. 1959(a). Otherwise its changes in the substantive provisions of 18 U.S.C. 1959would be essentially structural.[18] The approach of S. 155 is the same except for the absence of a generic trigger and the structural rearrangement.[19]

### Venue.

Subsection 105(b) of H.R. 1279 would permit prosecution of a violation of 18 U.S.C. 1959 either in the district in which the crime of violence or in any of the districts in which a racketeering activity of the enterprise occurs, proposed 18 U.S.C. 1959(c). The Constitution might constrain the amendment's reach.

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[17] Prosecution under 18 U.S.C. 1959 requires proof, among other elements, that the defendant acted as contractor (murder in consideration of a payment from a racketeering enterprise) or for status (to gain or improve his position within a racketeering enterprise). H.R. 1279 supplies an alternative if the defendant acts in furtherance of the activities of such an enterprise. There is some indication that the courts may consider this part of the status alternative at least for enterprise members, *see, United States v. Bruno*, 383 F.3d 65, 83 (2d Cir. 2004) (emphasis added)("the motive requirement is satisfied if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or *that he committed it in furtherance of that membership*").

[18] The substantive provisions now read: "Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall. . . "18 U.S.C. 1959(a).

H.R. 1279 amends them to read: "Whoever commits, or conspires, threatens, or attempts to commit, a crime of violence, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of furthering the activities of an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position, such an enterprise, shall . . ." proposed 18 U.S.C. 1959(a).

In both instances, "racketeering activity" means any of the RICO predicate offenses identified in 18 U.S.C. 1961(1), and "enterprise" means any entity or group associated in fact "which is engaged in, or the activities of which affect, interstate or foreign commerce," 18 U.S.C. 1959(b).

[19] "*Any person who*, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, *or in furtherance or in aid of an enterprise engaged in racketeering activity,* murders, kidnaps, *sexually assaults (which means any offense that involved conduct that would violate chapter 109A if the conduct occurred in the special maritime and territorial jurisdiction),* maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires to do so, shall be punished, *in addtiion and consecutive to the punishment provide for any other violation if this chapter . . .*" proposed 18 U.S.C. 1959(a).

The Constitution in Article III, section 2, clause 3 proclaims that "[t]he trial of all crimes . . . shall be held in the state where the said crimes shall have been committed. The Sixth Amendment confirms the proclamation with the assurance that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . ."

The Supreme Court has said that this precludes prosecution of a money laundering indictment in the district in which the proceeds to be laundered had been generated unless it was also the same district where the money laundering occurred, or unless the defendant was part of an overarching scheme that encompassed both the underlying offense and the money laundering, *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998). This should present no difficulties where the defendant is a member of the enterprise, but may be problematic where the defendant is a contractor of the enterprise.[20] S. 155's counterpart, section 107, has no such venue provision.

## Section 106. Violence Committed During and In Relation to Drug Trafficking

Section 106 of H.R. 1279 would create a new federal crime, 21 U.S.C. 865, which provides that

I. Whoever
  A. commits,
  B. conspires to commit, or
  C. attempts to commit
II. a crime of violence (18 U.S.C. 16 as amended by H.R. 1279), i.e.,
  A. an offense that has as element
    1. the use of physical force against the person or property of another,
    2. the attempted use of physical force against the person or property of another, or
    3. the threatened use of physical force against the person or property of another, or
  B. any other offense
    1. punishable by imprisonment for more than one year, and
    2. that
      a.. by its nature, involves a substantial risk that physical injury may result to the person or property of another, or
      b. is an offense punishable under subparagraph (A), (B), or (C) of section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A),(B),(C)).
III. during or in relation to
IV. a drug trafficking crime, (18 U.S.C. 924(c)(2)), i.e., a felony violation of
  A. the Controlled Substances Act (21 U.S.C. 801 et seq.),
  B. the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or
  C. the Maritime Drug Enforcement Act (46 U.S.C. App. 1901 et seq.)

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[20] Federal venue law is discussed in greater detail below in connection with of section 110 (venue in capital cases) of H.R. 1279.

Shall be subject to a series of penalties like those imposed for the commission of a violent crime in aid of racketeering (18 U.S.C. 1959 as it would be amended by section 105 of H.R. 1279) or for travel in, or use of the facilities of, interstate or foreign commerce to commit a violent crime for hire (18 U.S.C. 1958 as it would be amended by section 104 of H.R. 1279): if death results by death or imprisonment for life; otherwise by imprisonment for life or any term of years (but not less than 10 years as a general rule; not less than 20 years in the case of an assault resulting in serious bodily injury; not less than 30 years in the case of kidnaping, aggravated sexual assault, or maiming).

The new section is reminiscent of 18 U.S.C. 924(c) which outlaws using or carrying a firearm during and in relation to a crime of violence or drug trafficking. Nevertheless, as passed by the House, the new section appears somewhat circular since among other prohibitions it seems to proscribe drug trafficking (a crime of violence) during and in relation to a drug offense. This may well be a scrivener's error attributable to the fact that when the section was initially drafted its authors had not decided to amend the definition of crimes of violence to include drug trafficking, and after they did so the necessary editorial adjustment was overlooked. Yet, the Controlled Substances Act features a number of crimes that do not fall within the crime of violence definition.[21] It may seem a little like the dog wagging the tail in some instances, but the drafters may have intended these often less serious offenses should be more severely punished when drug trafficking occurs during and in relation to their commission. Of course, the same cannot be said of violations of the Controlled Substances Import and Export Act or the Maritime Drug Enforcement Act, since they are not included within the H.R. 1279 amended definition of crimes of violence. As a result, they can only stand on one side of the equation; they can only be the drug offense in relation to which a crime of violence is committed.

S. 155 has a corresponding section, section 108, which would prohibit violent crimes committed during or in relation to drug trafficking.[22] S. 155 would not amend

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[21] E.g., 21 U.S.C. 841(b)(2), (3)(trafficking in Schedule IV and V controlled substances respectively), 841(f)(wrongful distribution of listed [precursor] chemicals), 842 (regulatory offenses by registrants), 844 (simple possession), 854 (investment of illicit drug profits), 856 (maintaining drug-involved premises), 863 (sale of drug paraphernalia), 864 (theft of anhydrous ammonia)

[22] "Any person who, during and in relation to any drug trafficking crime, murders, kidnaps, sexually assaults (which means any offense that involved conduct that would violation chapter 109A if the conduct occurred in the special maritime and territorial jurisdiction), maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, commits any other crime of violence or threatens to commit a crime of violence against, any individual, or attempts or conspires to do so, shall be punished, in addition and consecutive to the punishment provided for the drug trafficking crime – (1) in the case of murder, by death or imprisonment for any term of years or for life, a fine under title 18, United stats Code, or both; (2) in the case of kidnaping or sexual assault by imprisonment for any term of years or for life, a fine under such title 18, or both; (3) in the case of maiming, by imprisonment for any term of years or for life, a fine under such title 18, or both; (4) in the case of assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment not more than 30 years , a fine under such title 18, or both; (5) in the case of committing any other crime of violence, by imprisonment for not more

the definition of crimes of violence to include drug trafficking, and consequently it raises no questions on that score. It does, however, contain a venue subsection,[23] whose reach might be limited to cases in which the drug trafficking is a continuous offense, in which the crime of violence and the drug trafficking occur in the same district, or in which the drug trafficking and the crime of violence are part of an overarching conspiracy.[24]

## Section 107. Multiple Interstate Murder

Section 107 would make it a federal crime to use travel in interstate or foreign commerce, or to use the mails or other facilities in interstate or foreign commerce, to commit two or more murders in violation of state or federal law – or to attempt or conspire to do so, proposed 18 U.S.C. 1123.[25] The crime would be punishable by death or life imprisonment, if death results; by imprisonment for life or any term of years not less than 20, if serious bodily injury results; and by imprisonment for life or any term of years not less than 10, in all other instances; and in all cases by a fine of not more than $250,000 (not more than $500,000 for organizations), id.

The corresponding section in S. 155 (section 201) differs in a number of respects, proposed 18 U.S.C. 1123. First, it would only apply if the defendant travels in interstate or foreign commerce and so would not include offenses where the victim engages in such travel nor offenses that involve the use of the mail or facilities of interstate commerce. Second, although the offense would apply in the case of *one* or more murders, the defendant must either conspire to commit or actually commit

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than 20 years, a fine under this title, or both; (6) in the case of threatening to commit a crime of violence specified in paragraphs (1) through (4), by imprisonment for not more than 10 years, a fine under such title, or both; (7) in the case of attempting or conspiring to commit murder, kidnaping, maiming, or sexual assault, by imprisonment for not more than 30 years, a fine under such title 18, or both; and (8) in the case of attempting or conspiring to commit a crime involving assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than 20 years, a fine under such title 18, or both," proposed 21 U.S.C. 865(a).

[23] "A prosecution for a violation of this section may be brought in – (1) the judicial district in which the murder or other crime of violence occurred; or (2) any judicial district in which the drug trafficking may be prosecuted," proposed 21 U.S.C. 865(b).

[24] *See, United States v. Rodriguez-Moreno*, 526 U.S. 275, 282 (1999)(holding that the offense of use of a firearm during and in relation to a kidnaping, 18 U.S.C. 924(c), committed in Maryland could be prosecuted in New Jersey since the kidnaping was a continuous offense begun in Texas but continuing through New Jersey and Maryland); *United States v. Cabrales*, 524 U.S. 1, 9 (1998)(holding that a money laundering offense committed in Florida could not be prosecuted in Missouri where the money generating drug trafficking occurred in the absence of evidence that the defendant was participant in the drug trafficking conspiracy).

[25] "Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, or who conspires or attempts to do so, with the intent that 2 or more intentional homicides be committed in violation of the laws of any state or the United States shall. . ." proposed 18 U.S.C. 1123.

the murder. Third, it would not cover attempt. Fourth, if death results, violations would be punishable by death or imprisonment for life *or for any term of years*; otherwise, conspiracy would be punishable by imprisonment for not more than 30 years for each murder plotted.

## Section 108. RICO Predicates

Federal Racketeer Influenced and Corrupt Organizations (RICO) law prohibits using the patterned commission of certain crimes (called predicate offenses or racketeering activity) to acquire or conduct the activities of an enterprise whose activities affecting interstate or foreign commerce, 18 U.S.C. 1962. The underlying predicate offenses consist of (a) designated federal crimes and (b) felonies punishable under state law as murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene material, or drug trafficking, 18 U.S.C. 1961(1). These state crimes may provide the basis for a RICO prosecution anywhere in the United States where state law applies. State law does not apply without federal acquiescence, however, in any federal enclave within the state that is subject to the exclusive legislative jurisdiction of the United States, as are portions of certain Indian reservations, e.g., "Indian country," 18 U.S.C. 1151.

Section 108 would amend RICO so that these state crimes might serve as RICO predicates when they would have qualified as such but for the fact they were committed in Indian country or some other federal enclave subject to the exclusive legislative jurisdiction of the United States, proposed 18 U.S.C. 1961(1)(A).

The section would also place the multiple interstate murder offense, 18 U.S.C. 1123, created in section 107, among the federal RICO predicates, proposed 18 U.S.C. 1961(1)(B). S. 155 has no provisions similar to those of section 108.

## Section 109. Bail for Firearms Offenses

Those arrested for the commission of federal crimes are entitled to release subject to those judicially determined conditions necessary to assure public safety and their subsequent appearance at judicial proceeds, 18 U.S.C. 3142(a)-(c). Upon the motion of the government in the case of crimes of violence and certain other serious crimes, the judicial officer must hold a hearing to determine, in light of statutory identified factors, whether any combination of conditions will assure public safety and appearance of the accused, 18 U.S.C. 3142(f), (g). In serious drug trafficking and child abuse offenses cases, there is a rebuttable presumption that no conditions with provide the necessary assurances, 18 U.S.C. 3142(e).

Among the statutory factors to be considered are "the nature and circumstances of the offense charged, including whether the offense is a crime of violence, or involves a narcotic drug." Section 109 would enlarge this category so that it would embody "the nature and circumstances of the offense charged, including whether the offense is a crime of violence, or *involves a controlled substance, firearm, explosive, or destructive device*," proposed 18 U.S.C. 3142(g)(1). It would also expand the grounds for a rebuttal presumption of detention numbering among them the fact the person has been charged with a crime of violence or possession of a firearm by a

member of certain disqualified classes (i.e., convicted drug traffickers, fugitives, mental defectives, illegal aliens, those under a domestic violence restraining order, and those with a misdemeanor domestic violence conviction), proposed 18 U.S.C. 3142(e).

The proposed rebuttal presumption amendment would work something of a duplication by virtue of the bill's amendment of the definition of a crime of violence to include drug trafficking offenses (section 112). Together section 109 and section 112 would create a rebuttal presumption of detention if the person is charged with (I) a crime of violence (including a violation of 21 U.S.C. 841(b)(1)(A), (B), (C), each of the offenses here carries a maximum term of imprisonment of more than 10 years) or (II) "an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act" (which includes 21 U.S.C. 841(b)(1)(A), (B), (C)).

The corresponding section in S. 155, section 202, presents no duplication since it has no provisions comparable to H.R. 1279's expansion of the definition of crime of violence and since in its rebuttable presumption subsection it refers to serious violent felonies as defined in 18 U.S.C. 3559(c)(2)(F) rather than crimes of violence. S. 155 also differs in that it would afford the government the right to move for a detention hearing when the accused is charged with unlawful firearms possession under any section 922(g) disqualifications, but would only limit its firearm possession enlargement of the rebuttable presumption to cases of possession by a felon convicted of a drug offense carrying a 10 year maximum term of imprisonment, proposed 18 U.S.C. 3142(f), (e).

## Section 110. Venue in Capital Cases

Section 110 would replace the requirement in 18 U.S.C. 3235, that capital case be tried in the county in which they occur if possible, with permission to prosecute capital cases (a) where they are committed, begun, continued or completed or (b) apparently, in cases involving importation or other activities that affect interstate or foreign commerce where the activities occur. There may be some question whether the Constitution permits the full exercise of the authority section 110 purports to grant. It might present interpretative challenges as well.

As noted earlier, the Constitution declares that "[t]he trial of all crimes . . . shall be held in the state where the said crimes shall have been committed.' U.S. Const. Art. III, §2, cl. 3. It also promises that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed," U.S. Const. Amend. VI. Speaking in the early days of the Republic, Justice Story pointed out that these provisions were designed with the convenience of the witnesses and fairness of the accused in mind.[26]

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[26] "It is observable, that the trial of all crimes is not only to be by jury, but to be held in the State where they are committed. The object of this clause is to secure the party accused from being dragged to a trial in some distant State, away from his friends, and witnesses, and neighborhood, and thus to be subjected to the verdict of mere strangers, who may feel

The Supreme Court has said that they require trial in the place where a crime occurs, a fact determined by the nature of the offense, that is from conduct that constitutes the offense, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999), *citing, United States v. Cabrales*, 524 U.S. 1, 6-7 (1998). Some crimes begin in one district and continue on to completion in another; others like conspiracy may have some elements committed in one district and other elements in another. In such cases, "where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done," *United States v. Rodriguez-Moreno*, 526 U.S. at 281, *quoting*, *United States v. Lombard*, 241 U.S. 73, 77 (1916); *see also, Hyde v. United States*, 225 U.S. 347, 356-67 (1912) (conspiracy may be tried in the location of the agreement or for conspiracies with an overt element where any overt act in furtherance of the scheme is committed).

The defendant in *Rodriguez-Moreno* had kidnaped an associate involved in a drug deal gone bad and transported him from Texas to New York to New Jersey and then to Maryland, 526 U.S. at 276-77. In Maryland, he acquired a handgun with which he threatened his kidnap victim, 526 U.S. at 277. He was tried in New Jersey for a violation of 18 U.S.C. 924(c)(1), using and carrying a firearm in relation to a crime of violence (kidnaping), 526 U.S. at 277. The Court rejected his claim that Article III and the Sixth Amendment precluded trial in New Jersey where the gun had neither been used or even carried. The Court looked closely at the elements of subsection 924(c) and pointed out that they included both a "using and carrying" element and a "crime of violence" element, 526 U.S. at 279-81. Kidnaping is considered a continuing offense. "The kidnaping, to which the §924(c)(1) offense is attached," reasoned the Court, "was committed in all of the places that any part of it took place, and venue for the kidnaping charge against respondent was appropriate in any of them," 526 U.S. at 282. And so, "[w]here venue is appropriate for the underlying crime of violence so too it is for the §924(c)(1) offense. As the kidnaping was properly tried in New Jersey, the §924(c)(1) offense could be tried there as well," 525 U.S. at 282.

In the course of its decision, the Court repudiated the lower court's "verb test" as sole determinant of the place where a crime is committed (the fact that Rodriguez-Moreno had, in the words of the verbs of section 924, "use and carried" the firearm only in Maryland was not controlling), 526 U.S. at 280. It declined to express an opinion, however, on the government's contention that venue "may permissible be based upon the effects of a defendant's conduct in a district other than the one in which the defendant performs the acts constituting the offense," 526 U.S. at 279 n.2.[27]

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no common sympathy, or who may even cherish animosities or prejudices against him. Besides this, a trial in a distant State or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence. There is little danger, indeed, that Congress would ever exert their power in such an oppressive and unjustifiable a manner. But upon a subject so vital to the security of the citizen, it was fit to leave as little as possible to mere discretion," III STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 654-55 (1833).

[27] *See, United States v. Bowers*, 224 F.3d 302, 312-13 (4th Cir. 2000)("At the same time, we do not understand the Supreme Court's recent decisions [in *Cabrales* and *Rodriguez-*

A casual observer might consider the Court's decision at odds with the views it expressed earlier in *United States v. Cabrales*, 524 U.S. 1 (1998). In *Cabrales*, the Court held that the violation of statutes that prohibited laundering the proceeds of various predicate offenses might not be prosecuted where the predicate offenses occurred, unless perhaps it could be shown that the defendant was a participant in some larger conspiracy that involved both offenses or had been involved in transporting the money from the place where the predicate offense occurred, 524 U.S. at 8-9.

In the mind of the Court, the fact that the gun use and the kidnaping were the contemporaneous misconduct of the defendant made all the difference; the predicate offense in *Cabrales* was a mere circumstance, an instance of conduct completed by others before the proscribed laundering began.[28]

Congress has implemented the Constitution's commands in several rules and statutes. The most basic of these, Rule 18 of the Federal Rules of Criminal Procedure states that, "Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice."

Cognizant of the fact that a crime may begin in one place and continue in another, Congress has provided that:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continue, or completed.
>
> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may

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*Moreno*] to have altered the well-established rule that Congress may, consistent with the venue clauses of Article III and the Sixth Amendment, define the essential conduct elements of a criminal offense in terms of their effects, thus providing venue where those effects are felt")(but holding that in the case of harboring or concealing a fugitive in violation of 18 U.S.C. 1071 prosecution could not be brought in the district of flight (where the effect of the fugitive's concealment was felt) when the harboring occurred elsewhere and the statute did make the effects of harboring an essential "conduct" element of the offense).

[28] "By way of comparison, last Term in *United States v. Cabrales*, we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)9ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, in Florida, where the prohibited laundering transaction occurred. As we interpreted the laundering statutes at issue, they did not proscribe 'the anterior criminal conduct that yielded the funds allegedly laundered.' The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant's money laundering activity – occurred after the fact of an offense begun and completed by others.' Here, by contrast, given the 'during and in relation to' language, the underlying crime of violence is a critical part of the §924(c)(1) offense," 526 U.S. at 280 n.4 (internal citations omitted).

> be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves. 18 U.S.C. 3237(a).

Federal law has recognized two specific provisions in cases of murder. One assigns venue in murder cases to the place where "injury was inflicted, or the poison administered or other means employed which caused the death," 18 U.S.C. 3236.[29] The other, 18 U.S.C. 3235, which dates virtually in haec verba back to the First Congress,[30] now provides that "The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience."

Section 110 of H.R. 1279 would rewrite this section to read:

> (a) The trial for any offense punishable by death shall be held in the district where the offense was committed or in any district in which the offense began, continued, or was completed.
>
> (b) If the offense, or related conduct, under subsection (a) involves activities which affect interstate or foreign commerce, or the importation of an object or person into the United States, such offense may be prosecuted in any district in which those activities occurred. Proposed 18 U.S.C. 3235.[31]

On its face, this new version of section 3235 would do away with the presumption in favor of trial within the county in which the capital offense occurs found in the existing version of 3235. Less clear is the status of section 3236 that assigns venue over murder to the district in which the harm resulting in death is inflicted. The new section 3235 does not mention murder but it might be said that there are few, if any, other crimes for which death is a constitutionally permissible penalty.[32] The prospect of conflict, however, may be reduced if section 3236 does not apply to many of federal crimes commonly thought to be capital offenses.[33] Yet,

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[29] *See e.g.*, Crim.Code of 1909, §336, 35 Stat. 1152 (1909).

[30] "That in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence," 1 Stat. 88 (1789).

[31] Identical language appears in section 203 of S. 155 as introduced.

[32] *Consider*, *Coker v. Georgia*, 433 U.S. 584, 598-601 (1977)(death penalty may not be imposed for the rape of an adult woman by an offender under sentence of life imprisonment at the time of the offense); *Enmund v. Florida*, 458 U.S. 782, 797 (1982)(death penalty may not be imposed under the felony-murder doctrine upon the getaway car driver whose accomplishes committed the murder during the course of a robbery); *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987)(death penalty may be imposed upon a defendant who was an active, intentional participant in a murder actually committed by a co-defendant).

[33] The Fourth Circuit has held that neither section 3235 nor 3236 apply to a violation 18 U.S.C. 924(c) even one punishable by death, "Count 11 is the capital charge. Barnette argues that venue for this crime should have been in the district containing Roanoke, Virginia, where the murder took place, pursuant to the venue provision for capital murder cases in 18 U.S.C. 3235-3236. Section 3235 requires the government to try capital offenses in the county where the defendant committed the offense. The offense in this case, however, which the statute refers to is not the murder of Miss Williams, but a violation of 18 U.S.C. 924(c)(1), using or carrying a firearm during or in relation to a crime of violence. This

it seems more probable that the new version is intended to supercede section 3236 as well, even though repeals by implication are not favored.[34] Of course, there is no conflict if section 3236 is read, like the new version of section 3235, to permit (rather than to require) a murder prosecution in the district in which the death causing harm is inflicted.

Possible conflicts with section 3236 aside, the new version of section 3235 would appear to change or at least clarify the law in several ways. It would declare that "any offense punishable by death shall be held in the district where the offense was committed or in any district in which the offense began, continued, or was completed." Other continuous or multidistrict crimes may already be prosecuted in any district in which they are begun, continued, or completed, 18 U.S.C. 3237(a). Thus, the new version of section 3235 would confirm that murders punishable by death when committed during the course of federal crimes considered continuous for venue purposes, such a kidnaping, 18 U.S.C. 1201, may be prosecuted in any district in which the continuing offense might have been prosecuted.

In its new form, section 3235 would decree that "[i]f the offense, or related conduct, under subsection (a)[capital offenses that may be prosecuted in any district in which they are committed, begin, continue or are completed] involves . . . the importation of an object or person into the United States, such offense may be prosecuted in any district in which those activities occurred." Under existing law, any other "offense involving . . . the importation of an object or person into the United States is a continuing offense and . . . may be . . . prosecuted in any district from, through, or into which such . . . imported object or person moves," 18 U.S.C. 3237(a). Facially the two are similar but not the same.

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crime is a capital offense because §924(j)(1) provides that the death penalty may be imposed if the offense results in a murder as defined in 18 U.S.C. 1111. While the definition of murder in §1111 applies to determine whether the crime is a capital offense, it does not define the crime Barnette was charged with. Against, the government prosecuted Barnette for a violation of §924(c)(1), venue for which is proper in the place where the underlying crime of violence [18 U.S.C. 2261 relating to interstate domestic violence] occurred. Therefore . . . we are of opinion that venue was proper in the Western District of North Carolina because the underlying crime of violence involved traveling across state lines from Charlotte, North Carolina to Roanoke, Virginia," *United States v. Barnette*, 211 F.3d 803, 814 (4th Cir. 2000). If the venue provisions of section 3235 prior to amendment and of section 3236 do not apply to a murder committed in violation of 18 U.S.C. 924(c)(1), perhaps they do not apply to other federal capital offenses with venue distinctive elements. And hence at least in those instances section 3236 and the new version of section 3235 do not conflict.

[34] "[T]he cardinal rule [is]. . . that repeals by implication are disfavored. Inferring repeal from legislative silence is hazardous at best," *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003); "We have repeatedly stated, however, that absent 'a clearly expressed congressional intention, repeals by implication are not favored.' An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter act covers the whole subject of the earlier one and 'is clearly intended as a substitute,'" *Branch v. Smith*, 538 U.S. 254, 273 (2003)(internal citations omitted).

And so too it can be said of the new section's treatment of commerce based crimes. It would state that, "[i]f the offense, or related conduct, under subsection (a) [capital offenses that may be prosecuted in any district in which they are committed, begin, continue or are completed] involves activities which affect interstate or foreign commerce . . . such offense may be prosecuted in any district in which those activities occurred." The corresponding provision of existing law states that, "[a]ny offense involving the use of the mails, [or] transportation in interstate or foreign commerce . . . is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be . . . prosecuted in any district from, through, or into which such commerce, [or] mail matter. . . moves. 18 U.S.C. 3237(a).

The obvious intent is to describe venue in capital cases at least as broadly as venue is described in noncapital cases – when importation or transportation in interstate or foreign commerce (including use of the mails) are involved. Where existing law assigns venue for noncapital cases to any district where the related activities of movement from, through, and into a place have occurred; the new section 3235 would assign venue for capital cases to any district in which importation or commerce affecting activities involving the offense or related conduct (be it movement or otherwise) occur. Or so it might appear. Terms like "related conduct" and "activities" seem to have a breadth and potential ambiguity that terms like "importation" and "transportation" lack.

In the past, it may have been thought that general venue statutes like the new section 3235 could reach no further than permitted by the language that detailed the elements of the crime – venue is where the crime occurs; the crime occurs where any of its essential elements occur.[35] Section 3235, however, may reflect the view that the Congress possesses the legislative authority to establish venue for a particular offense on the basis of the effects of the particular crime either by the placing an effects element among the other elements within in the substantive proscriptive statute or placing the effects element within a general venue statute that applies several proscriptive statutes of a common stripe. The approach of the courts heretofore, by and large, seem to preclude such an option, but the Court may have signaled a willingness to depart from that perception in *Rodriguez-Moreno*.[36]

## Section 111. Statute of Limitations for Crimes of Violence

Federal capital offenses may be tried at any time, 18 U.S.C. 3281. Most other federal crimes must be prosecuted within five years of their commission, 18 U.S.C.

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[35] In the Supreme Court's various "effects" cases, the Court's focus has been upon the act which proscribed the misconduct, although the cases admittedly do not indicate whether this was a necessary or merely convenient focus, *see, United States v. Johnson* , 323 U.S. 273, 275-78 (1944); *Armour Packing Co. v. United States*, 209 U.S. 56, 73-77 (1908); *In re Palliser*, 136 U.S. 257, 266-68 (1890).

[36] "The Government argues that venue also may permissibly be based upon the effects of a defendant's conduct in a district other than the one in which the defendant performs the acts constituting the offense. *Because this case only concerns the locus delicit [place of where the offense is committed]*, we express no opinion as to whether the Government's assertion is correct," 526 U.S. at 279 n.2 (emphasis added).

3282. The statute of limitations for some federal crimes, however, is longer than five years. Certain federal crimes of terrorism have an eight year statute of limitations, and may be prosecuted at any time if they involve a risk of death or serious bodily injury, 18 U.S.C. 3286. A few federal arson and explosives offenses have a ten year statute of limitations, 18 U.S.C. 3295, and federal crimes involving the kidnaping or abuse (sexual or physical) of child may be brought any time during the life of the child, 18 U.S.C. 3283.

H.R. 1279 would establish a fifteen year statute of limitations for noncapital crimes of violence, proposed 18 U.S.C. 3298.[37] By virtue of the amended definition of crimes of violence (section 112 of H.R. 1279), the new period of limitations would also apply to drug trafficking, proposed 18 U.S.C. 16. The new section was undoubtedly intended to replace the general five year statutes of limitation in the case of crimes of violence, and presumably the short periods applicable to arson and noninjury terrorism offenses. Yet, an issue may develop over whether in cases of overlap the bill intends to supercede the longer statutes of limitation that would apply under sections 3283 (crimes against children) and 3286 ( terrorist crimes involving injury risks).

S. 155 would establish a ten year statute of limitations for crimes of violence (or eight years after the crime is discovered if results in a longer period of limitation). Unlike the H.R. 1279 (in section 112) it would not enlarge the definition of "crimes of violence. It would begin with the enigmatic phrase, "[e]xcept as otherwise expressly provided by law." It is unclear whether this refers to the general five year statute of limitations provided by law; or to the specific periods for terrorism offenses, child abuse offenses, arson offenses and the like; or to all of them; or to none of them.

## Section 112. Definition of Crime of Violence

Federal law contains several definitions of "crime of violence." The most commonly used is found in 18 U.S.C. 16 which the changes made by section 112 of H.R. 1279 would provide:

> The term "crime of violence"means–
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is ~~a felony~~ *an offense punishable by imprisonment for more than one year* and that, by its nature, involves a substantial risk that physical *injury* ~~force against~~ *may result to* the person or property of another ~~may be used in the course of committing the offense~~, *or is an offense punishable under subparagraph (A), (B), or (C) of section 401(b)(1) of the Controlled Substances Act*.

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[37] "No person shall be prosecuted, tried, or punished for any noncapital felony, crime of violence, including any racketeering activity or gang crime which involves any crime of violence, unless the indictment is found or the information is instituted not later than 15 years after the date on which the alleged violation occurred or the continuing offense was completed," proposed 18 U.S.C. 3298.

Language identical to that in 18 U.S.C. 16 (prior to changes proposed in H.R. 1279) appears in 18 U.S.C. 924(c)(3). Since section 924(c)(3) does not have a specific cross reference to section 16, it will not automatically carry forward any changes to section 16 such as those proposed in H.R. 1279.

H.R. 1279 would make three changes in section 16. It would change the definition to include crimes punishable by imprisonment for more than one year rather than using the term felonies. The change might at first seem purely grammatical since federal law usually defines felonies as crimes punishable by imprisonment for more than one year, *see e.g.*, 18 U.S.C. 3559. There are instances, however, where federal law uses the term "crime of violence" to encompass not only federal crimes or state crimes and sometimes crimes under the laws of foreign jurisdictions. In such cases, the distinction may be technically significant.

The second change involves including crimes that risk physical injury rather than those that risk the use of physical force. The change would be more inclusive. While there may be few instances where the use of physical force does not involve a risk of injury to persons or property, there are many instances in which physical injury may result from misconduct that does not involve physical force (e.g., crying fire in a crowded theater).

The third change would add drug trafficking crimes to the definition of crimes of violence. More precisely, it would add "an offense punishable under subparagraph (A), (B), or (C) of the section 401(b)(1) of the Controlled Substances Act [21 U.S.C. 841(b)(1)(A), (B), (C)]." Those subparagraphs establish the penalties for trafficking in schedule I or II controlled substances (heroin, cocaine, large amounts of marijuana, etc.) in violation of 21 U.S.C. 841(a). It remains to be seen whether the phrase is intended to include other offenses whose punishment is determined in some instance by reference to those subparagraphs. It is unclear for example whether the expanded definition covers violations of 21 U.S.C. 846, "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense [including in the appropriate case subparagraphs 841(b)(1)(A), (B), or (C)], the commission of which was the object of the attempt or conspiracy." Similar quandaries arise with respect to 21 U.S.C. 848 (drug kingpin violations), 859 (distribution to juveniles), 860 (distribution or manufacture proximate to schools, etc.), 861 (employing juveniles to distribute near schools), or 862 (employing juveniles in drug operations). In any event, it rather clearly would not apply to the parallel provisions of the Controlled Substances Import and Export Act, 21 U.S.C. 951-963.

Whatever its scope, the drug offense inclusion in the definition of "crime of violence" would obviously be expansive because of the substantial number of federal statutes that use the term "crime of violence."[38] Nevertheless, its impact would be

[38] E.g., *2 U.S.C. 1961* (capitol police may make arrests for crimes of violence); *8 U.S.C. 1227* (aliens are deportable who engage in domestic crimes of violence); *15 U.S.C. 1245* (possession of a ballistic knife during the commission of a federal crime of violence); *18 U.S.C. 25* (use of minors in crimes of violence); *18 U.S.C. 842(q)(2)(B)*(teaching the use of destructive devices known to be intended for use in a federal crime of violence); *18 U.S.C.*

less sweeping than might be supposed because many of the statutes already apply to both crimes of violence and drug trafficking.[39] Others either adopt the definition

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*931* (possession of body armor by an individual convicted of a crime of violence); *18 U.S.C. 1952* (interstate travel with intent to commit a crime of violence in furtherance of an unlawful activity); *18 U.S.C. 1959* (threat to commit a crime of violence in aid of RICO activity); *18 U.S.C. 3181* (extradition (without an applicable extradition treaty) from the U.S. of foreign national charged with an overseas crime of violence against an American); *18 U.S.C. 3521* (witness protection program is available to those who might otherwise be the victims of crimes of violence); *18 U.S.C. 3561* (requiring probation or imprisonment for those convicted of domestic crimes of violence); *18 U.S.C. 3663A* (mandatory restitution for crimes of violence); *20 U.S.C. 1232g* (family educational and privacy right exception for the disclosure of certain disciplinary proceeding results involving crimes of violence); *20 U.S.C. 6736* (limitation on liability for teachers – exception for crimes of violence); *21 U.S.C. 841(b)(7)*(distributing a controlled substance unbeknownst to the recipient with the intent to commit a crime of violence);*42 U.S.C. 1437f(o)(6)(A)(i)* (permits public housing agencies to afford victims of crimes of violence assistance preferences); *42 U.S.C. 1437f(o)(16)(B)(i)* (authorizing the necessary funds for relocation of public housing tenants who are the victims of crimes of violence assistance preferences); *42 U.S.C. 14503* (crime of violence exception for volunteers' liability immunity); *50 U.S.C. 403o* (CIA security personnel are considered acting within the scope of their authority when they reasonable use force to protection Agency personnel from a crime of violence or to prevent the escape of an individual believed to have committed a crime of violence within the presence of the agent).

[39] E.g., *8 U.S.C. 1101* (crimes of violence and drug trafficking are aggravate felonies); *18 U.S.C. 924(c)(1)(A)*(penalties for carrying a firearm in connection with a federal crime of violence or drug trafficking crime; *18 U.S.C. 924(c)*(confiscation of firearms or ammunition used or intended for use in a crime of violence or controlled substance offense); *18 U.S.C. 924(k)*(smuggling a firearm into the U.S. with intent that it be used to commit a crime of violence or controlled substance violation); *18 U.S.C. 929* (possession of armor piercing ammunition during the commission of a crime of violence or drug trafficking offense); *18 U.S.C. 924(h)*(transfer of a firearm with the belief it will be used in a crime of violence or drug trafficking); *18 U.S.C. 1028* (enhanced penalties for identification document fraud when committed in connection with a crime of violence or a drug trafficking offense); *18 U.S.C. 1956* (money laundering in the U.S. in connection with a crime of violence or drug trafficking against a foreign nation); *18 U.S.C. 3142* (preventive detention hearing for those charged with a crime of violence or a 10 year drug felony); *18 U.S.C. 4042* (Bureau of Prisons notification requirements upon the release of an inmate convicted of a crime of violence or drug trafficking offense); *18 U.S.C. 5038* (fingerprinting of juveniles found to have committed an act that would be a crime of violence or drugj offense if committed by an adult); *22 U.S.C. 2728, 4304b* (reports to Congress concerning diplomatic personnel believed to have committed a felony or crime or violence); *28 U.S.C. 994(h)*(federal sentencing guidelines should punish the third conviction for a crime of violence or drug trafficking at or near the maximum permissible term of imprisonment); *42 U.S.C. 14135a* (authorizes the Attorney General to collect DNA samples from those convicted of a federal felony or crime of violence).

found in section 924(c)(3) which does not change[40] or provide their own definition.[41]

## Section 113. Hearsay Exception for Wrongdoing

Both for reasons of reliability and in some instances as a matter of constitutional requirement,[42] the law prefers that witnesses testify in court rather than have the court receive previous out of court hearsay evidence. Thus, the Federal Rules of Evidence make hearsay evidence inadmissible unless otherwise provide for by rule or statute, F.R.Evid. 802.

Some time ago, the Supreme Court recognized a hearsay exception for the out of court statements of a witness whom the defendant had caused to be unavailable:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. *Reynolds v. United States*, 98 U.S. 145, 158 (1879).

The Federal Rules of Evidence, which apply in both criminal and civil cases, include a more generous exception for any "statement offered against a party that has engaged *or acquiesced* in wrongdoing, that was intended to, and did, procure the unavailability of the declarant as a witness," F.R.Evid. 804(b)(6)(emphasis added). Two lower federal appellate courts have concluded that conspirators can be said to have "acquiesced in" any foreseeable and otherwise qualifying wrongdoing of their conspirators.[43] Although the Supreme Court subsequently questioned the constitutional validity of hearsay exceptions premised on alternative grounds for reliability, it accepted the validity of the "wrongdoer exception," at least as described in *Reynolds*.[44]

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[40] E.g., *18 U.S.C. 844 (o)* (transfer of explosive materials with the belief they will be used in a crime of violence; *18 U.S.C. 924(a)(6)(B)(ii)*(increased penalty for transfer of a firearm to a juvenile by an adult with the belief it will be used in a crime of violence)*; 18 U.S.C. 924(g)*(interstate travel to acquire a firearm for use in a crime of violence.

[41] E.g., *18 U.S.C. 373* (solicitation to commit a crime of violence); *28 U.S.C. 540A* (authorizes FBI investigation of a felony crime of violence committed against a traveler).

[42] U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

[43] *United States v. Cherry*, 217 F.3d 811, 815-20 (10th Cir. 2000); *United States v. Thompson*, 286 F.3d 950, 961-95 (7th Cir.2001). One member of the panel in *Cherry* dissented on the grounds that "to say a defendant has waived his right under the confrontation clause merely because of his participation in a drug conspiracy is too expansive and goes against the rule of fundamental fairness," 217 F.3d at 823 (Holloway, J., dissenting in part). The third circuit, declined to address "this difficult waiver issue," because the government's brief made only a "glancing reference" to it, *United States v. Rodriquez-Marrero*, 390 F.3d 1, 17-8 (1st Cir. 2004).

[44] "[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. See *Reynolds v. United States*, 98 U.S.145, 158-159 (1879)," *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

At a minimum, section 113 of H.R. 1279, as passed by the House, would seem calculated to codify the construction endorsed in by the federal appellate courts in *Cherry* and *Thompson*. The language used, however, might be thought to embrace anyone who might reasonably anticipate that some third party (coconspirators or stranger) would wrongfully procure the absence of a witness, for it amends Rule 804(b) of the Federal Rules of Evidence to read in pertinent part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (6) A statement offered against a party ~~that~~ *who* has engaged or acquiesced in wrongdoing, *or who could reasonable foresee such wrongdoing would take place, if the wrongdoing* ~~that~~ was intended ~~to~~, and did, procure the unavailability of the declarant as a witness (changes made by H.R. 1279 noted by "strike outs" and italics).

The wording chosen for the comparable provision in S. 155 (section 206) seems to preclude such an expansive reading, since it would amend Rule 804(b) to read:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (6) A statement offered against a party that has engaged, ~~or~~ acquiesced, *or conspired,* in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness (changes made by S. 155 noted by "strike outs" and italics).

## Section 114. Use of Firearms in Crimes of Violence

Section 114 would amend 18 U.S.C. 924(c)(1)(A) which supplements the sanctions imposed when someone uses a firearm during and in relation to crime of violence. After amendment the provision would read in pertinent part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime. . . for which the person may be prosecuted in a court of the Untied States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, *or conspires to commit any of the above acts, shall, for each instance in which the firearm is used, carried, or possessed*, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than *7* five years;
>
> (ii) if the firearm is discharged, be sentenced to a term of not less *15* ~~10~~ years; *and*
>
> *(iii) if the firearm is used to wound, injure, or maim another person, be sentenced to a term of imprisonment of not less than 20 years*, proposed 18 U.S.C. 924(c)(1)(A).

As section 924 now stands, subsection 924(o) makes conspiracy to violate subsection 924(c) punishable by imprisonment for not more than 20 years; or to imprisonment for any term of years or for life if the firearm is a machine gun or equipped with a silencer, 18 U.S.C. 924(o). Section 114 would repeal subsection 924(o). Subsection 924(o) was probably considered unnecessary since section 114 would cover conspiracy with the same penalties that apply to the substantive

violations of subsection 924(c) and because subsection 101(c) of the bill would establish an alternative general conspiracy offense with a penalty of imprisonment for not more than 20 years, proposed 18 U.S.C. 924(c)(1)(A), 371. Moreover, possession of a machine gun or firearm equipped with a silencer in violation of subsection 924(c) (as well as conspiracy to possess by virtue of section 114) would be punishable by imprisonment for not less than 30 years, proposed 18 U.S.C. 924(c)(1)(A), (B)(ii).

Section 209 of S. 155, like section 114 of H.R. 1279, would increase the general mandatory minimum for violations of 18 U.S.C. 924(c) from five to seven years; would treat conspiracy the same as the underlying violations of subsection 924(c); and would repeal subsection (o). It would not, however, increase the penalty for discharging a firearm or that for wounding a victim; nor would it increase the penalty under the general conspiracy statute to not more than 20 years (leaving it instead at not more than five years), consequently the impact of repealing subsection(o) would be somewhat different.

## Section 115. Federal Trial of Juveniles as Adults

Under existing law federal prosecution of a juvenile for the commission of a federal criminal offense is possible under one of three circumstances: (1) no state court has and is willing to exercise jurisdiction over the juvenile; (2) no state, able and willing to assume jurisdiction, has adequate available juvenile programs and services available; or (3) there is a substantial federal interest in the case and the juvenile is alleged to have committed (a) a felonious crime of violence; (b) a drug trafficking violation; or (c) one of a series of firearms violations, 18 U.S.C. 5032.

If a juvenile is not turned over to state authorities, he is subject to federal delinquency proceedings unless he is transferred to district court for trial as an adult pursuant to either a discretionary or mandatory transfer, id. Under existing law mandatory transfers are only available for 16 and 17 year old repeat offenders alleged to have committed a crime of violence or drug trafficking, id.[45]

Section 115 would replace the mandatory transfer provisions of 18 U.S.C. 5032, with provisions that would allow for prosecution as an adult at the Attorney

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[45] ". . .However a juvenile who is alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony offense that has as an element thereof the use, attempted use, or threatened use of physical force against the person of another, or that, by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense, or would be an offense described in section 32, 81, 844(d), (e), (f), (h), (i) or 2275 of this title, subsection (b)(1) (A), (B), or (C), (d), or (e) of section 401 of the Controlled Substances Act, or section 1002(a), 1003, 1009, or 1010(b) (1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 959, 960(b) (1), (2), (3)), and who has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this paragraph or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed, shall be transferred to the appropriate district court of the United States for criminal prosecution . . ." 18 U.S.C. 5032.

General's discretion, would eliminate the requirement that the juvenile be a repeat offender, and would adjust the profile of the crimes that require transfer:

> . . .The Attorney General may prosecute as an adult a juvenile who is alleged to have committed an act after that juvenile's 16th birthday which if committed by an adult would be a crime of violence that is a felony, an offense described in subsection (d), (i), (j), (k), (o), (p), (q), (u) or (x) of section 922 (relating to unlawful [firearms] acts), or subsection (b), (c), (g), (h), (k), (l), (m), or (n) of section 924 (relating to [firearms] penalties), section 930 (relating to possession of firearms and dangerous weapons in federal facilities),or section 931 (relating to purchase, ownership, or possession of body armor by violent felons) . . . Proposed 18 U.S.C. 5032.

The discretion afforded by section 115 can be triggered by crimes that apparently would not justify certification of federal interest in order to proceed against the juvenile as a delinquent.[46] It would appear therefore that the drafters did not intend to limit the Attorney General's exercise of his discretion to cases that he had previously certified to be of substantial federal interest.

S. 155 would revise federal juvenile more extensively than would H.R. 1279. It would preserve the mandatory transfer of 18 U.S.C. 5032 including its limitation to repeat offenders. In a subsequent subsection, however, it would permit trial of 16- and 17-year-olds as adults in the case of a more selective collection of violent crimes,[47] but would authorize a transfer back to juvenile proceedings in such cases following a hearing, governed by the discretionary transfer considerations, at which the juvenile would bear the burden, proposed 18 U.S.C. 5032(d), (e).

## Section 116. Law Enforcement Publicity Campaign

Section 116 would explicitly authorize the Attorney General to conduct a publicity campaign in areas of intense interstate gang activity or with existing or emerging gang problems to highlight the increased penalties under H.R. 1279. The Attorney General might also report on the campaign to the House Committee on the Judiciary. S. 155 has no similar provisions.

## Sections 117 and 119. Illegal Aliens in FBI Database

The Federal Bureau of Investigation's National Crime Information Center maintains a criminal records database. H.R. 1279 would contain two apparently identical provisions, sections 117 and 119. They would instruct the Department of Homeland Security to provide the FBI with information on aliens who have

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[46] For instance, section 115 permits discretionary prosecution in a case involving 18 U.S.C. 924(b), (c), (g), (h), (k), (l), (m), or (n); while certification is possible in cases involving only 18 U.S.C. 924(b), (g), or (h).

[47] I.e., murder, manslaughter, assault with intent to commit murder, sexual assault, robbery, carjacking with a dangerous weapon, extortion, arson, firearms use, firearms possession during and in relation to a crime of violence or drug trafficking, drive-by shooting, kidnaping, maiming, assault resulting in serious bodily injury, obstruction of justice, or any felony punishable by death, life imprisonment, or imprisonment for twenty-five years or more, proposed 18 U.S.C. 5032(d),(e).

overstayed their visas, been ordered to be removed from the United States, or have agreed to leave the United States. They would authorize the FBI to include information on violation of the immigration laws within the NCIC systems, proposed 28 U.S.C. 534(a)(4). S. 155 has no similar provisions.

## Section 118. Crimes of Violence by Illegal Aliens

Section 118 would establish an additional mandatory minimum sentence of five years (15 years in the case of alien previously removed for criminal misconduct) or illegal aliens who commit, attempt to commit, or conspire to commit "a crime of violence (as defined in section 16) or a drug trafficking offense (as defined in section 924)," proposed 18 U.S.C. 1131. Sentences imposed under the section would be served consecutive to the sentences imposed for the underlying crimes of violence or drug trafficking, id. Again there would be some internal overlap within the new section because H.R. 1279 would encompass drug trafficking within its definition of crimes of violence. The overlap would be less than complete duplication because the revised definition would covers drug trafficking but not the other violations of the Controlled Substance, Controlled Substance Import and Export, and the Maritime Drug Enforcement Acts that 18 U.S.C. 924 sweeps within its definition of drug trafficking. S. 155 has no similar provisions.

## Section 120. Study of Any Nexus Between Illegal Aliens and Gangs

Section 120 would direct the Attorney General and the Secretary of Homeland Security to study and report on the connection between illegal immigration and gang membership and activity. S. 155 has no comparable provisions.

## Section 201. High Intensity Interstate Gang Activity Areas

Section 201 would authorize the appropriation of $60 million for each of the next five fiscal years to permit the formation of criminal street gang enforcement teams in high intensity interstate gang activity areas. It would authorize the appropriation of $20 million for each of the next five fiscal years to allow the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) to hire agents and inspectors to be assigned to high intensity interstate gang activity areas to ensure improved reporting of gang weapons use. And it would authorize appropriations of $7.5 million to employ additional Assistant United States Attorneys to be assigned to high intensity interstate gang activity areas.

The high intensity interstate gang activity areas would be designated by the Attorney General in consultation with local area officials and the governors of the appropriate states. The Attorney General's decision would be informed, among other things, by the level of gang activity and violent crime in a particular area, the extent to which state and local law enforcement agencies have attempted to address the problem, and extent to which federal assistance would be beneficial.

The section would command the Attorney General to establish an FBI National Gang Intelligence Center to provide a clearinghouse through which federal, state, and

local law enforcement officials can share gang activity information and analysis. He would be directed to establish a regional gang activity databases for each of the high intensity interstate gang activity areas.

Section 110 in S. 155 is comparable. It would authorize appropriations of $50 million for this fiscal year and each of the next four fiscal years to fund criminal street gang enforcement teams. Although it has no specific matches for the BATFE or federal prosecutor components of H.R. 1279, S. 155 has a number of individual grant provisions of its own, e.g., authorized appropriations of: $50 million a year for five years for gang crime prevention programs (section 110); $7.5 million a year for five years to expand Project Safe Neighborhoods to enhance criminal gang prosecution efforts (section 111); $5 million a year for five years for increased FBI investigative capacity in the area of violent criminal street gangs (section 112); and $20 million a year for six years to reauthorize the gang resistance education and training projects program (section 114).

### Section 202. Gang and Violent Offender Technology and Training

Section 202 would authorize appropriations of $20 million for each of the next five years for prosecutorial and law enforcement training and technology to assist in the identification and prosecution of gang members and violent offenders. Section 113 of S. 155 is similar except that it would authorize $12 million a year for the same purposes as well as to create and expand witness protection programs.

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